**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 26741 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE K.M.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**BONNY SYSTEM & 2 - Petitioner(s)**
**Versus**
**CHIRAYU MADHUSUDAN AGNIHOTRI - Respondent(s)**

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**Appearance :**
MR MD PANDYA for Petitioner(s) : 1 - 3.
MR SM SHAH for MR PREMAL R JOSHI for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA**

**Date : 26/12/2006**

**ORAL JUDGMENT**

Rule. Service of Rule is waived by learned advocate appearing for the respondent.

1. The petitioners - M/s.Bonny System and two

others have filed this petition under Article 227 of the Constitution of India with a prayer to quash and set aside the order dated 16.10.2006 passed below Exh.228 in Special Civil Suit No. 108 of 2003 by the 4th Addl.Senior Civil Judge, Vodadara and allow the same or pass such other appropriate orders.

2. I have heard Mr.M.D.Pandya, learned Senior Advocate appearing on behalf of the petitioners – original defendants and Mr.S.M.Shah, learned Advocate appearing on behalf of the respondent – original plaintiff. He has stated that the Court can dispose of the matter without recording the reasons in detail.

3. The brief facts of case are that, the petitioners are engaged in the business of sale of computer hardware run in the name of petitioner No.1. Respondent No.2 was also running business in the same products who met petitioner No.2 and they commenced joint business in the name of M/s.Bonny Info Tech Pvt.Ltd. in the same premises of Petitioners.

3.1 Petitioner No.2 being a lady, heavily relying upon the respondent and as per his advice, used to sign blank cheques for business purposes. The respondent taking advantage of the faith reposed by petitioner No.2, withdrew huge sums and entered transactions with Union Bank of India withdrawing more than Rs.2 lacs for personal benefit. In April 2002 when this conduct came to light, the respondent

assured petitioner No.2 that reimbursement will be made and not to proceed against him.

3.2 However, contrary to the assurance given, not only there was no reimbursement but a further withdrawal of Rs.10,000/- for personal use by the respondent was made.

3.3 Further, as a part of some design to defraud, respondent utilised a blank cheque signed by petitioner No.2 from her proprietary business and drew a sum of Rs.34,46,700/. The respondent presented the said cheque in the Bank, but it was dishonoured for want of fund. Therefore, he filed a criminal complaint to pressurise petitioner No.2 and he also filed Special Civil Suit No. 108 of 2003 on 26.2.2003 making false allegations about sale of computer, spare parts to petitioner No.2 on the strength of non-genuine got up invoices and that the cheque that had bounced represented sale price of goods sold, though in fact there were no such transactions.

3.4 In the said suit, application Exh.5 for interim relief was also filed and the status-quo order was passed on 23.4.2004.

3.5 Being aggrieved and dissatisfied with the aforesaid order, petitioners preferred Appeal From Order No. 462 of 2004 in this Court. This Court (Coram: R.R.Tripathi, J.) recorded the fact that

respondent could not produce documents in support of the invoices and satisfied of bonafides of petitioner No.2 and vacated the interim relief on 10th Jan.2005.

3.6 On 4th April 2005, petitioner No.2 filed application Exh.83 for production of relevant documents in possession of the respondent, which came to be rejected on the ground that the suit had reached the stage of cross-examination of respondent-plaintiff.

3.7 During cross-examination, the respondent admitted of being in possession of many relevant documents which were not produced and expressed readiness to produce the same if so directed by the Court.

3.8 On the basis thereof, application Exh.208 was given seeking production of the said documents pointing out the importance for proper adjudication and pointing out that cause of action for filing Exh.83 arose when respondent on oath showed his willingness to produce the documents.

3.9 The said application Exh.208 came to be rejected on 15.4.2006 on the ground that earlier order could not be revised and though Court could not compel production can take adverse note for non-production at relevant time as per provisions of Evidence Act as there was no provision to recall the previous order.

3.10 The aforesaid order was challenged by he petitioners by filing Special Civil Application No.12377 of 2006 which came to be withdrawn upon the Court (Coram: A.M.Kapadia, J.) granting leave to the petitioners to approach the trial Court with an application requesting to draw adverse inference for non-production of documents and directed the trial Judge to consider such application in accordance with law vide order dated 29.6.2006.

3.11 Thereafter on 21.7.2006, the petitioners filed application Exh.223 setting out history of previous proceedings and orders, vital importance of documents withheld by the respondent for proper adjudication. The said application was contested by the respondent raising question of res-judicata.

3.12 The learned Judge held that “doctrine of res-judicata would not come in the way because order of the High Court was very clear that it was open for the petitioners to file such application. Not only that further the order also shows and suggests that on production of such application, the learned trial Judge shall decide the same in accordance with law. Thus, there is no adequate force in the submission of Ld.Advpcate that as earlier such type of application has been decided by the Court the doctrine of res-judicata would come in way.” The learned Judge further observed that “he was aware that there is only a question of drawing the adverse inference whenever required and for very purpose the

application is tendered. The learned Judge partly granted the application Exh.223 negativating the contention of res-judicata and ordering production of documents vide order dated 7th Sept.2006.

3.13 Petitioner No.2 filed application Exh.228 for non-compliance of the order dated 7.9.2006. The respondent filed reply for the first time contending that documents required to be produced were not in his possession and answers in cross-examination were due to mistake and misunderstanding and affidavit with some documents were filed. The learned Judge, for the reasons set out in his order dated 16th Oct.2006 dismissed application, which is impugned in this petition.

4. Mr.M.D.Pandya, learned Senior advocate appearing for the petitioners submitted that the learned trial Judge has committed grave error in dismissing the application without appreciating the evidence on record and without giving cogent and convincing reasons and therefore, the petition is required to be allowed by quashing and setting aside the impugned judgment and order. On the other hand, Mr.S.M.Shah, learned Senior advocate appearing for the respondent supported the the order of the learned trial Judge and submitted that it is just and proper, no interference of this Court is warranted in this behalf.

5. In view of the above, without adjudicating the

matter on merits, interest of justice will be achieved if the following order is passed:

(1)The order dated 16th October 2006 passed below application Exh.228 in Special Civil Suit No.108 of 2003, by the 4th Addl.Senior Civil Judge, Vadodara is hereby quashed and set aside.

(2)The learned trial Judge is requested to hear the petitioners/plaintiffs and respondent/defendant and decide the application Exh.228 afresh after hearing both the sides.

(3)The learned trial Judge is requested and hear both the petitioners/plaintiffs and respondent-defendant and decide the application Exh.228 which has been filed by the plaintiffs and to decide the same in accordance with law as expeditiously as possible and preferably not later than 28th March 2007. However, while the learned Judge passes the order, the learned Judge will not be influenced by the earlier order passed by him as the same has been set aside by this Court.

(4)The respondent states that he desires to file appropriate application before the trial Court in the suit and if any such application is filed, it will be open for the learned Judge also to consider the request made on behalf of the respondent in this behalf. However, the

learned Judge will have to first decide application Exh.228 and thereafter consider the application of the respondent for expediting the suit after hearing both the parties.

(5) Both the parties agree that they will cooperate in proceeding with the matter and will not seek unnecessary adjournment which will stall the proceedings.

6. In the result, the petition is allowed to the aforesaid extent. Rule is made absolute accordingly. No order as to costs.

(K.M.Mehta, J.)

Sreeram.